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ABSTRACT

Understanding the family life behavior of any society requires understanding its family policy. This involves knowing the history of that policy, what it was intended to accomplish, how it was put into practice, and its consequences. The relationship between family policy and behavior was investigated by examining the experience of Canadian law with regard to marriage, bigamy, child neglect, birth control, abortion and family allowances. It shows that policy may be designed to accomplish a variety of purposes, and that the effects are not always what might have been expected. Discrepancies between policy and societal attitudes and behaviors result from difficulty in: (1) determining whether policy is formed from law or from general usage; (2) identifing reasons for the creation, maintenance, and change of that policy; and (3) realistically expecting legislation to be a major influence on family life behaviors. (Author)

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The Development of Family Policy in Canada*

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The Development of Family Policy in Canada

Whether it is implicit or explicit, all societies pratice a policy with regard to families. Understanding the positions taken by different nations provides both a means of accounting for family life in those countries, and a perspective for evaluating present and proposed policy in one's own. Arriving at this understanding, however, involves considering a number of questions. Among these are: What is the policy? What is its intent, and what are the set of concerns upon which it was based? How was the policy actually realised in practice? Has it changed over time, and if so how and why? And, last, what were its consequences?

The purpose of this study is to examine several aspects of family policy in Canada. These include its position with regard to marriage, divorce, bigamy, child neglect, birth control, abortion, and family allowances.

Marriage

Canada's colonial past complicates the attempt to understand its family policy. One reason is that the historically piece-meal settlement of the nation by the British resulted in an uneven patchwork of English laws applicable in various parts of the country (Master, 1970). As a colony was acquired by settlement, the laws of England (common, statute and ecclesiastic) became immediately applicable. They then continued in force until the colony established a local legislature. As a result the dates to which the English law extended varies among

the provinces.

Another source of difficulty is the Canadian constitution. This document, the British North America Act of 1867, provides the Federal Parliament with the power to enact laws concerning marriage and divorce; but gives provincial legislatures the right to pass laws concerning the solemnising of marriage, civil rights, and the administration of justice - an ambiguity which results in legal confusion.

This confusion is demonstrated in the marriage laws of Anglophone Canada, which have their origin in English canon law. Because of the Roman Catholic doctrine of the indissolubility of marriage, medieval ecclesiastical courts were prevented from granting decrees of divorce. This did not, however, keep them from pronouncing that for various reasons, such as marriage within prohibited degrees of relationship, a marriage had never taken place.

This practice was maintained by the English after the break with Rome, and the prohibitions enacted in 1540 under the reign of Henry VIII were encorporated into the statutes of several provinces (New Brunswick, Prince Edward Island, and Nova Scotia) as part of the English law in force at the time of their creation. Since that time, however, the law in England has been revised. But, because it is not within the scope of the provincial legislatures to change it, and since the Federal government has not done so to any great extent, in order for Canadians in some places to know whom they might marry it is necessary for them to refer back to a 450 year old English statute.

The situation is further complicated by the fact that under the original English law it was possible for persons, after the death of one or both of the spouses, to have the ecclesiatical courts declare a marriage null. As a consequence the children of such marriages were bastardised and could not inherit their parents' property. However, since a large number of children were being made illegitimate, the situation was remedied by the creation of a distinction between marriages which were void and those which were "voidable" - that is valid marriages which could only be set aside at the insistance of one of the spouses during their lifetime. In this way many children were saved from bastardy and the loss of their property claims.

Due to social changes it was decided in England in 1835 that marriages within the previously prohibited degrees of relationship again be treated as void. Although the change was designed to eliminate confusion in England, the effect in Canada was quite different. Because of the differences among the provinces in the dates to which certain English laws applied, marriages which in some places were only voidable were, in others, void.

Common-law marriages present another difficulty. Such arrangements are often void because one partner is already married. Due to the historical application of the 1835 English law, the children of such unions were considered, in western Canada, be illegitimate. Thus, the attempt in England to solv blem of illegitimacy had the effect of creating one in C

Bigamy and Polygamy

Not only does Canadian policy concern itself with whom a person may marry, but also with their number. As with other areas of its family law, the position in favour of monogamy is founded in English ecclesiastical law. Bigamy and polygamy first became criminal offences in England in 1603, and were later adopted into the Canadian Criminal Code.

In time, though, a distinction appeared between the English and Canadian statutes. By 1894 a marriage in Canada was not considered to be bigamous if the previously married partner believed "in good faith" that his wife or her husband was dead. In the English law this was no defence. Furthermore, in 1894 the Canadian Code defined both "Mormon marriages" and "living or cohabitating in any kind of conjugal union with a person who is married" as polygamous - although these two sections were later dropped.

The law with regard to bigamy and polygamy is unambiguous and has changed little over time. Although it is clear that bigamous marriages performed within the country are not recognised, a discrepancy exists in the case of foreigners and immigrants who entered into such a relationship in a place and at a time it was legal. In 1930 the Criminal Code was amended to exclude from prosecution those persons who were not Canadian and had gone through a bigamous marriage outside of the country. This did not, however, clarify their position while inside of the country. As a result, it is currently an open question as to whether or not such a union in a place where it is recognised is to be considered a marriage in Canada. In the face of this

ambiguity Canadian courts have tended to afford them broad recognition, and the children of a polygamous marriage have been granted rights to property and are considered to be legitimate (DaCosta,1966).

Divorce

Even though the Federal Parliament had since 1867 the power to write a divorce code for the country, it did not do so until 1968. Up until that time the laws varied among the provinces and were based upon either pre-Confederation or English statutes.

In three provinces the laws prior to 1968 were founded upon local colonial statutes which were in force at the time of their joining Confederation (Nova Scotia, 1758; New Brunswick, 1791; Prince Edward Island, 1835), all of which allowed for decrees of divorce to be obtained through the civil courts. Except for minor differences and revisions, the grounds for divorce in these provinces were adultery, frigidity, impotence, and marriage with the prohibited degrees of Henry VIII.

Prior to 1540 marriage law in England was administered through the ecclesiastical courts, which did not recognize the right to divorce. After this time, however, the sole power to grant divorce was given to the British Parliament. Therefore, since Parliament had the jurisdiction, and was not limited in its powers, there were no specific grounds for a divorce.

This system of Parliamentary divorce was adopted by three of the Canadian provinces at the time they entered Confederation (Quebec,1867; Ontario,1867; Newfoundland,1949). With the exception of Ontario, which introduced judicial divorce in 1930, the only method of obtaining a divorce in these places remained,

until 1968, a private member's Act in the Federal Parliament.

Even though until 1968 an Act of Parliament was the only way of getting a divorce in some parts of Canada, the law in England itself was changed in 1858. This law, the Divorce and Matrimonial Causes Act, established for the first time both the right to divorce for certain causes and a system of civil courts to administer it. The provinces of British Columbia, Alberta, Saskatchewan and Manitoba, as well as the Northwest and Yukon Territories, had divorce laws based on this English statute.

The effect of this lack of a national policy is demonstrated by the disparity in divorce rates among the provinces. Even though between 1867 and 1876 civil divorce was nominally available in three provinces, it was practised in only two of them. This is because although Prince Edward Island had a divorce court, it never met. During the time between these years there were only 31 divorces granted in the entire country, and the two provinces with divorce courts (Nova Scotia and New Brunswick), which made up only 18% of the nation's population, accounted for 87% of them.

The influence of policy upon behaviour is again seen in the experience of Ontario, which introduced judicial divorce in 1930. In the preceding decade its divorce rate averaged 4.56 per 100,000 persons. In the ten years following 1930, however, this increased at one and a-half times the national national rate, to 25/100,000 in 1940.

By the mid-1960's it became clear that the divorce laws in Canada were unsatisfactory (DaCosta,1975). The requirement in some places of an Act of Parliament was discriminatory and the

strict grounds which existed in others encouraged perjury and colusion. Therefore, with the intent of "getting the government out of the bedroom" the federal government passed the Divorce Act of 1968. This Act considerably liberalized the grounds for a divorce, and was interpretted as

> "...expressing the public will to soften the rigors of the marriage bond as recognised in English canon law and founded upon the thesis that the general happiness of married life was secured by the indissolubility of the marriage bond, even though in individual cases its principals operated with great severity" (Schroeder,1970).

In the year following the passage of this Act the divorce rate nearly doubled, and by 1972 it was three times what it had been in 1968.

Child Neglect

The original Canadian policy regarding the protection of children was a descendant of the English Poor Laws, enacted during the reign of Elizabeth I. These were not intended to provide therapy for families, but rather to punish delinquent parents and determine financial responsibility (Fraser, 1972).

In 1799 an "Act to Provide for the Education and Support of Orphan Children" was passed for Upper Canada (Ontario). It decreed that an abandoned child became a ward of the town in which he lived. This was changed in 1869 to provide a prison term of between two and three years for anyone who "...fails to provide for any...child...necessary food, clothing or lodging" or "...abandons or exposes any child under the age of two years [to conditions under which] the life of such child is endangered

or health injured." This was revised in 1892 to cover the failure to provide for children under the age of 16 and neglecting those less than two years old; and in 1955 to abandoning a child under the age of 10.

Although these laws were clearly intended to hold parents responsible for bringing up their children, their actual effect is demonstrated by two sets of figures. One is the number of deserted children coming under public care and the other the number of convictions for child neglect. Between 1884 and 1912 Ontario averaged about 41 convictions per year. In comparison, the 1912 Annual Report of the Provincial Superintendent of Neglected and Dependent Children cites that during that one year alone 742 Protestant children became wards due to either abandonment or their parents' failure to support them. It is clear, then, that even though the intent of the law was to hold parents repsonsible for their children, the practice at the time was to allow them to give them up.

This situation changed in 1913 with the passage of the "Children's Protection Act." It renewed the policy of parental responsibility, and made those found guilty of certain offences (among them, allowing a child to beg in the streets) liable for a fine of $100 or a sentence to three months labour. In the year following the introduction of this Act (1913) the number of children committed to Aid Societies in Ontario increased by 11%, to 823. However, during that same year the number of convictions for child neglect were up over 700%, to near 350. This policy of strict enforcement was was short-lived, and the rate of convictions began to decline almost immediately. With the

emphasis in recent years on family intervention rather than individual responsibility, the national rate of convictions for neglect has fallen to less than 1/10,000,000; and in some years there have been no arrests at all.

Abortion

Under the Roman Julian law a woman who procured her own abortion was considered to be guilty of an "extraordinary crime," but not to having committed homicide. This is because an unborn child was not regarded as human. Even under medieval English law procuring an abortion was an ecclesiastical rather than a criminal offence (Stephen,1883).

This has not, however, been the case in Canada, which historically has maintained a rigoursly pro-natal policy. The 1843 Criminal Statutes are unequivocal in stating that any person, who with any intent to procure the abortion of any woman under any circumstances, is guilty of a felony and may be punished by a life sentence to hard labour. In 1893 this law was expanded to differentiate among different forms of the crime, such as a woman's procuring her own abortion or a person's supplying the means for an abortion. Consequently, until 1969 there were no legal abortions in Canada.

This does not mean, however, that there were no abortions performed. It is estimated that in 1967 alone there were 100,000 illegal operations (Pelrine,1971). There were also convictions. During the fifty year period prior to 1969 these averaged approximately 79 per 1,000 married women in the population per year, although most of those convicted were male.

In 1966 the House of Commons commissioned a Committee of

the Department of National Health and Welfare to examine the nation's policy concerning family planning, birth control, and abortion. As a result, in 1969 the Criminal Code was amended so that an abortion is considered to be legal if it is performed under the following conditions:

1. That it is carried out by a qualified medical practitioner in an accredited or approved hospital.

2. That the practitioner receive a certificate in writing from the therapeutic abortion committee of that hospital [although no hospital is required to establish such a committee] stating that the continuation of the patient's pregnancy would or would be likely to endanger her life or health.

3. That the therapeutic abortion committee consists of not less than three members, each of who must be a qualified medical practitioner, not including the practitioner performing the operation.

Based only upon these changes in the law it would appear as if the government had clearly changed its policy so as to make abortion readily available. In practice, however, it created a situation in which the policy is actually determined by individual physicians in local hospitals. Consequently, even though the number of legal abortions has increased, from 11,152 in 1969 to 49,311 in 1975, the availability of an operation is still determined by a woman's place of residence. Because no hospital is required to perform an abortion, and many have refused to establish abortion committees, the operation is actually available in less than one-third of them. Furthermore, such questions as whether or not the qualification concerning

the condition of a woman's health can be interpretted to include mental health remain unresolved. As a result the official abortion rate in Canada ranks well behind that of many European and Asian nations.

Contraception

Consistent with its pro-natalist position on abortion, Canada's policy historically has been to discourage the availability of artificial forms of birth control. Law concerning them was entered into the Criminal Code in 1892. Although it might be expected that the impetus for this legislation was from Roman Catholics, it instead came from pressure to conform with the prevailing morality of Victorian Protestantism. The particular statute was included in a section of the law dealing with "Offences to Morality," and made it illegal for anyone to:

> "...advertise, publish an advertisement of, or have for sale or disposal any medicine, drug or article intended or represented as a means of preventing contraception or causing abortion."

Except for slight revisions and alterations, this remained the law in Canada for nearly 75 years. It was not, however, rigoursly enforced. Between 1963 and 1965 there were several attempts, on the grounds that "it is the right of the people to get the necessary information legally that they are now getting illegally," to have the restrictions removed. Finally, in response to such items as a survey which revealed that two-thirds of the adult population favoured birth control (Ottawa Citizen, 1965), the Federal government established a committee to

consider bills which would change the law.

In 1968 the government, citing a number of reasons, introduced new legislation. Among the reasons given given for this were that the former statute dealt with what was an issue of private morality; it bred contempt for the law since it was routinely ignored; it was not even observed by the government, as it authorized and licensed the manufacture and sale of contraceptive pills; by this time most major Protestant churches had reversed their position and now supported family planning; and the new law was more in keeping with Canada's policy at the United Nations on such items as world population control.

In essence this amendment, passed in 1969, simply made legal what was already being practised throughout the country. It did this by deleting the words "preventing contraception" from the existing statute. At present the manufacture and sale of contraceptives is controlled by the Federal Food and Drug Act; and any advertisement is allowed provided it passes the government's censorship board. Although there is currently no national policy on availability, in British Columbia any physician may prescribe contraceptives to anyone over the age of 16 without his or her parents' knowledge or approval. Despite this change in policy there is little evidence of its effects, in as much as the nation's birth rate already had been declining steadily since 1959.

Family Allowances

As with other facets of its policy, the origins of Canada's family allowance programme can be traced to earlier developments in England. Among these are the Speenhamland Plan, introduced in

1795; the Child Labour Acts of 1819 and 1842; and the Education Bill of 1870 (Rathbone,1949). Despite these precedents, and others such as the existance of Provincial mother's allowance plans and the introduction of family support schemes in Belgium (1930), France (1932), Italy (1934), the Soviet Union (1936) and Spain(1938), Canadians expressed little interest in the idea until the 1942 publication in England of the Beveridge Report. This inspired its Canadian counterpart, the Marsh Report (1944), and the eventual passage of the Family Allowance Act.

Although the intention of "...ensuring a minimum of well-being to the children of the nation and...help [in gaining] for them [more] equality...in the battle of life" (Earl of Athlone,1944) was one of the motives for this action, it was not the only one. The government also hoped that it would serve to redistribute income and lessen the impact of the recession which was expected to occur at the end of the war.

Whereas these arguments were raised in support of the family allowance plan, others were presented in opposition to it. Among these were (Vadakin,1968): that the allowances would depress wages; parents would misspend the payments; the administrative costs would be intolerable; other welfare measures were more deserving; the allowance would increase the birth rate--especially among the poor and Catholics in Quebec; and the programme would create an excessive bureaucracy.

In its original form the Canadian system related the amount of monthly payments to the age of the child. Families received $5.00 for each child under the age of 6; ages 6 through 9, $6.00; 10 through 12, $7.00; and 13 to 15, $8.00. Since the

beginning of the plan these amounts have been increased sustantially, and additional supplement programmes have been introduced.

After 35 years of operation, it now appears as if the earlier concerns about the programme were unfounded. There is no evidence that it has acted to depress industrial wages; the requirements for eligibility appear to have reduced the opportunity for fraud; the administrative costs have been kept in check; and the birth rate has remained similar to both countries which provide larger payments and ones, like the United States, which pay none at all.

It seems, therefore, that none of the calamitous consequences expected of the programme ever materialised. Yet, on the other hand, neither it seems did any of the anticipated benefits. Although Canada managed to avoid a peace-time recession, the experience of the United States suggests that this owes little to the payment of family allowances. Furthermore, despite the legal requirement that the payments be used exclusively for the maintenance, care, training, education and advancement of the child, there is no guarantee that this is actually realised. And, last, a study of the economic effects of the plan (Deutsch,1968) has shown that the redistribution of wealth which it achieves is negligible.

Summary and Conclusions

The purpose of this study has been to demonstrate the difficulties involved in understanding the family policy of a nation. It has done this by examining several aspects of that

policy as it exists in Canada.

One of these difficulties is simply to determine what the policy is. Although legislation which specifically mentions families is one reflection of a society's position concerning them, it is not the sum of its policy. Almost every action taken by a government, whether obstensibly dealing with the economy, law enforcement or national security, affects families and demonstrates its attitude toward them. In addition, there is the question of whether the actual policy of a nation is that which is placed on its statute books or permitted among its population. For example, even though at one time the law in Canada forbade both polygamy and the distribution of contraceptives, the government provided de facto approval of them by its failure to prosecute.

Another problem is to indentify the reasons for the creation, maintenance and change of that policy. As has been shown, these may include concern for things other than the immediate welfare of family members: things such as a person's spiritual well-being, cutting government costs, redistributing income, the pressure of public opinion, or altering the demographic characteristics of the population (Lee,1971). Moreover, there is no assurance that the reasons which are given for these actions are, in fact, the real ones; or, for that matter, that the real ones are even known. It might be that the ultimate causes are not consciously recognised, and that such factors as the growth rate of the population, dependency ratios, amount of surplus production in the economy, or, as has been suggested (Adler,1907), the nation's level of moral development,

remain unacknowledged.

Finally, these examples demonstrate that an ad hoc approach to policy, without any clearly-defined strategy, may result in such contradictions as Canada's liberalisation of abortion and contraception while maintaining a pro-natal family allowance programme. On the other hand, they also show that even if consistent policy objectives were to exist, the use of legislation to influence family-life behaviour has limitations. Although changes in the law can have dramatic effects, as seen by the result of Canada's recent divorce legislation, legal proscriptions and economic incentives are only two among many factors which persons consider when deciding their behaviour. The Canadian experience with family allowances, abortion, child neglect and contraception provide evidence that no matter how well-intentioned it might be, a policy which contradicts what people percieve to be in their own personal best interests is not likely to succeed.